Nos. 02-241 & 02-516

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IN THE

Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

—v.—

LEE BOLLINGER, *et al.*,

Respondents.

JENNIFER GRATZ and PATRICK HAMACHER,

Petitioners,

—v.—

LEE BOLLINGER, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN JEWISH COMMITTEE; CENTRAL CONFERENCE OF AMERICAN RABBIS; HADASSAH; NATIONAL CONFERENCE FOR COMMUNITY AND JUSTICE; NATIONAL COUNCIL OF JEWISH WOMEN; PROGRESSIVE JEWISH ALLIANCE; UNION OF AMERICAN HEBREW CONGREGATIONS; AND WOMEN OF REFORM JUDAISM, THE FEDERATION OF TEMPLE SISTERHOODS IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI*[1]

The **American Jewish Committee** ("AJC") is a national, not-for-profit, human relations organization, founded in 1906 for the purpose of protecting the civil and religious rights of Jews. It maintains 33 regional offices in major cities nationwide and has more than 150,000 members and supporters. In furtherance of its goal to strengthen the basic principles of pluralism around the world and at home as the best defense against anti-Semitism and other forms of bigotry, AJC has advocated for the removal of the historical barriers faced by many in our society, particularly those of color. For example, AJC sponsored the study demonstrating the psychological impact of prejudice and discrimination upon children cited by this Court in its landmark *Brown v. Board of Education* decision.[2]

At the same time, AJC has recognized the harmful effects of making inflexible predeterminations about the correct composition of student bodies in the context of higher education. For this reason, AJC has staunchly opposed, and continues to oppose, the types of quotas used to restrict Jewish admission to universities in the earlier part of the Twentieth Century. Such quotas were born of bigotry and precluded the assessment of applicants as individuals.

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1 Blanket consent letters indicating the parties' approval of the filing of *amicus* briefs have been filed with the Clerk of the Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, their counsel, or their members made a monetary contribution to the preparation or submission of this brief.

2 *Brown v. Board of* Education, 347 U.S. 483, 495 n.11 (1954) (citing K.B. Clark, *Effect of Prejudice and Discrimination on Personality Development* (Mid-century White House Conference on Children and Youth, 1950)).

The two cases currently before the Court require the synthesizing of these two principles, *i.e.*, the importance of removing historical barriers without making inflexible predeterminations. While recognizing that the removal of historical barriers to advancement is critical to eradicating our nation's legacy of discrimination, there is another compelling value at stake – diversity in higher education. Diversity not only provides all students with a richer educational experience, but also prepares them for participation in our pluralistic democracy. AJC believes the compelling interest of diversity can best be served through carefully tailored admissions programs, such as the programs in place at the University of Michigan and its Law School.

The **Central Conference of American Rabbis** ("CCAR"), founded in 1889, is the rabbinic arm of the Reform Jewish Movement. It represents some 1,800 rabbis across North America. Our nation's history has been marred by centuries of racial and ethnic prejudices and wrongdoings. As Jews, who have often been the victims of such prejudices, we value the importance of equality. It is noted in Genesis that all of God's children are "created in the image of God." History continues to teach the importance of equality and that "all people benefit when the barriers to true equality are removed." (CCAR Resolution on Affirmative Action, 1978). In that spirit, and in recognition of the value of a diverse campus community, CCAR supports the carefully crafted programs at issue here.

Hadassah, the Women's Zionist Organization of America, founded in 1912, is the largest women's and Jewish membership organization in the United States, with over 300,000 members nationwide. In addition to Hadassah's mission of maintaining health care institutions in Israel, Hadassah has a proud history of protecting the rights of women and the Jewish community in the United States. Hadassah supports affirmative action as an essential tool to

achieve a "level-playing field" of opportunity for historically excluded Americans and to ensure diversity in education from which all participants and society benefit. While Hadassah rejects the use of quotas to achieve diversity, Hadassah supports the use of goals and timetables. Hadassah believes that race is one factor that may be taken into account, among many other factors, in making educational admissions decisions.

The **National Conference for Community and Justice** ("NCCJ"), founded in 1927 as The National Conference of Christians and Jews by such leaders as U.S. Supreme Court Justices Charles Evans Hughes and Benjamin Cardozo, is a human relations organization dedicated to fighting bias, bigotry, and racism. NCCJ promotes understanding and respect among all races, religions and cultures through advocacy, conflict resolution and education through its national office and 58 regional offices. NCCJ supports realistic goals and timetables in affirmative action plans, and opposes the use of quotas except in rare instances in court-ordered, short-term situations to remedy egregious discrimination in education, healthcare, jobs and economic opportunity.

Affirmative action policies must be maintained to advance the creation of educational settings and workplaces that promote diversity and inclusion and are free of bias, bigotry, and racism. Largely because of affirmative action programs, our nation has made significant strides toward providing access and opportunity that have resulted in people of color and women assuming new roles of leadership. Affirmative action has created examples of success, inspired the young and shown the benefits a diverse workforce brings to corporate America. Yet, it is much too soon to declare victory over racial and gender bias, as it is indisputable that a majority of the U.S. population – people of color and women – are still facing discrimination in education, healthcare, jobs

and other economic opportunities. One of the most important values of achieving higher education is that it is a gateway to opportunity for the next generation of leaders and citizens. As such, NCCJ supports the admissions programs currently in place at the University of Michigan and its Law School.

The **National Council of Jewish Women** ("NCJW") is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy and community service to improve the quality of life for women, children and families and strives to ensure individual rights and freedoms for all. Founded in 1893, NCJW has 90,000 members in over 500 communities nationwide. Given NCJW's *National Principle*, which states that "A democratic society and its people must value diversity and foster mutual understanding and respect for all," as well as NCJW's *National Resolution* supporting "equal opportunity for all in the public and private sectors through programs such as affirmative action," NCJW joins this brief.

The **Progressive Jewish Alliance** ("PJA") is a national membership organization dedicated to the Jewish traditions of ensuring social and economic justice, promoting equality and diversity and pursuing peace. Under the rubric of "Tikkun Olam, Tikkun Ha Ir" ("Repair of the World, Repair of the City"), PJA works in alliance with other organizations and individuals similarly dedicated to achieving these goals in Southern California and beyond.

The issues raised in this case are of profound concern to PJA. The American Jewish community is acutely aware of the need for all Americans to have access to excellent higher education. Jewish tradition recognizes the importance of higher education as a value in and of itself, and also as a gateway to full participation in society. This is especially the case with regard to law school. Jewish legal tradition recognizes that every judge's unique personal perception

impacts his or her administration of the law. *Babylonian Talmud*, Tractate Sanhedrin, 6b. Thus, the more varied the pool of judges and attorneys produced by our legal education system, the more robust and just our legal system will be. PJA believes that carefully tailored admissions policies, such as those in place at the University of Michigan and its Law School, currently offer the best formula for achieving diverse and highly qualified student communities.

The **Union of American Hebrew Congregations** ("UAHC") is the central body of the Reform Movement in North America. UAHC is the largest Jewish movement in North America, composed of 900 Reform congregations and 1.5 million Reform Jews. The Jewish tradition has always been sensitive to the plight of the stranger. A long, dark history of injustice and prejudice has made African Americans, Latinos, women and other groups strangers in society's mainstream. As Jews deeply committed to the prophetic imperatives of our tradition, the Reform Movement "is dedicated to those deeds that will create justice for all people." (UAHC Resolution on Affirmative Action, 1977). UAHC supports the programs at issue as important tools for addressing the effects of discrimination and for fostering diversity on campus.

Women of Reform Judaism, The Federation of Temple Sisterhoods, comprised of 100,000 women in 600 local groups nationwide, deeply committed to the social justice teachings of the prophets, is constitutionally mandated to serve humanitarian causes. Its resolutions, adopted through democratic processes, enable Women of Reform Judaism to implement this mandated principle. Over the years, Women of Reform Judaism has adopted numerous resolutions calling for: quality public education to prepare all students for effective participation in employment and community; affirmative action and equity programs; and greater understanding of America's increasing diversity.

Women of Reform Judaism joins this brief in furtherance of its resolutions.

STATEMENT OF THE CASES

Both cases before the Court involve the consideration of race as a factor in the admission to public universities:

1. Pursuant to an admissions policy that was drafted to comply with this Court's decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), the University of Michigan Law School considers race as one factor among many that are weighed to determine which law school applicants receive offers of admission. The policy states that the Law School "seek[s] a mix of students with varying backgrounds and experiences who will respect and learn from each other." *Grutter v. Bollinger*, 288 F.3d 732, 736 (6th Cir. 2002).

2. The admissions program for the College of Literature, Science and Arts at the University of Michigan, which also was implemented in response to this Court's decision in *Bakke*, is based upon a "selection index" points system. Under that program, an applicant's race is a factor that is considered. Applicants are awarded points for a variety of factors, including their membership in an "under-represented" racial or ethnic minority group. *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 827-28 (E.D. Mich. 2000).

SUMMARY OF ARGUMENT

I. The historic Jewish opposition to quotas does not mandate rejection of carefully tailored goals. The Jewish community knows first hand the harm imposed by the utilization of quota systems in higher education because quotas were used by premier American universities in the early decades of the Twentieth Century to limit the number of Jewish students. As a result, many in the Jewish

community welcomed this Court's decision in *Bakke*, which struck down a special admissions program at a state medical school where 16 of 100 slots for entering students were set aside for minority students and, as part of that program, a separate admissions committee considered the applications of the minority students. However, flexible goals aimed at increasing the numbers of minority students at a given university are not the same as unconstitutional quotas.

The admissions programs utilized by the University of Michigan, at both the Law School and the College of Literature, Science and Arts, do not constitute quotas and are constitutional. Under these admissions systems, race is only one of many factors considered. There are no fixed numbers or percentages of persons from a given race who will be admitted. Rather, each student's academic strengths, personal achievements and life experiences are given consideration, and the most overwhelming criteria used in making admissions decisions are academic qualifications.

II. Considering race as a factor in university admissions furthers the compelling governmental interest of achieving diversity in higher education in the United States. Diversity is an important component of a well-rounded education, especially in such a pluralistic country as our own. Exposure in universities to those of diverse backgrounds and experiences will better equip those graduates who go on to become the leaders of our future. Only if diversity is permitted to continue and flourish in our universities will our children receive the rich and rewarding education that they deserve.

III. The means used by the University of Michigan to meet the compelling interest in obtaining diversity in higher education do not run afoul of the Equal Protection Clause. Rather, they are narrowly tailored to meet that interest. Disallowing the consideration of race as one factor among many in university admissions would have the

effect of eliminating meaningful diversity on American campuses. The University of Michigan should be free to choose among properly crafted programs one that is best suited for achieving a diverse student body.

ARGUMENT

I. HISTORIC JEWISH OPPOSITION TO QUOTAS DOES NOT MANDATE REJECTION OF NARROWLY TAILORED ADMISSIONS PROGRAMS LIKE THOSE IN PLACE AT THE UNIVERSITY OF MICHIGAN AND ITS LAW SCHOOL.

Our country was founded upon certain bedrock principles, chief among them being freedom and equality. However, freedom and equality have not always been available to all of our citizens. Many of them (notably Native Americans, African Americans, other minority populations and women) have historically been treated as second-class citizens. For many years, Jews were treated similarly in many parts of this country. Legislation has been passed, cases have been decided, and programs have been implemented as societal values and mores have evolved in an effort to achieve for all the freedom and equality to which our country strives. The important issues that arise out of the two cases before the Court are by-products of our past. This Court by no means is writing on a clean slate.

Of course, the precedent most relevant to the issues here is this Court's decision in *Bakke*. In *Bakke*, the Medical School of the University of California at Davis had established a "special admissions" program under which 16 of the 100 positions in the class were set aside for "disadvantaged" minority students. 438 U.S. at 272-75. In addition, the "special admissions program operated with a separate committee, a majority of which were members of minority groups." *Id.* at 274.

This quota system was found to be unconstitutional. "It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats." *Id.* at 319 (Powell, J.). Accordingly, the "two-track" program was found to be in violation of the Equal Protection Clause. *Id.* at 289-90. However, in striking down the medical school's admissions program, Justice Powell distinguished between unconstitutional quota systems and the constitutionally legitimate consideration of race as a factor in university admissions. *See id.* at 320 and discussion *infra* at pp. 13, 22-24. Particularly because of its unique experience with exclusionary quotas, many in the Jewish community vigorously opposed the admissions program challenged in *Bakke*, and therefore applauded this Court's decision in that case.

A. The Jewish Experience With Quotas.

During the early decades of the Twentieth Century, quotas were used to limit the number of Jews admitted to colleges and universities.[3] Among the elite private

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[3] The use of quotas against Jews was not a new phenomenon. *Numerus clausus* laws enacted in several European countries limited Jewish participation in schools and occupations to certain numbers or percentages, usually in relation to the total population. For example, Hungary enacted a law that provided that the student bodies in the universities should be proportioned by race to reflect the racial percentages of the total population. *Local Union No. 35 of the Internat'l Brotherhood of Elec. Workers v. Hartford*, 625 F.2d 416, 426 (2d Cir. 1980) (Van Graafeiland, dissenting). In addition, Bulgaria limited the number of Jews in both schools and occupations by its Law for the Defense of the Nation. *Id.* In fact, the law restricted the number of Jewish doctors to twenty-one, the number of Jewish lawyers to twenty,

institutions, Harvard, Yale, Princeton, Columbia and Dartmouth have well-documented histories of using quotas to restrict the admission of Jewish candidates. In the 1920s, Harvard, Yale and Princeton used various means to limit the number of Jewish students, including "photographs attached to admissions forms, specific questions regarding the applicant's race and religion, personal interviews, and restriction of scholarship aid." M. Synnott, *The Half-Opened Door: Discrimination at Harvard, Yale, and Princeton, 1900-1970*, pp. 19-20 (Greenwood Press 1970). Harvard's President, Abbott Lawrence Lowell, sought to justify Harvard's use of quotas limiting the number of Jews as reducing anti-Semitism within the student body: ""If their number should become 40 percent of the student body,' he explained in a letter to Alfred Benesch, a prominent Jewish alumnus from Cleveland, 'the race feeling would become intense. When on the other hand, the number of Jews was small, the race antagonism was also small.'" H. Feingold, *Lest Memory Cease: Finding Meaning in the American Jewish Past*, p. 95 (Syracuse University Press 1997) (citation omitted).

In the summer of 1934, Dartmouth alumnus Ford H. Whelden wrote to Robert C. Strong, the director of admissions, stating: "[T]he campus seems more Jewish each time I arrive in Hanover. And unfortunately many of them . . . seem to be the 'kike' type." W. Honan, *Dartmouth Reveals Anti-Semitic Past*, N.Y. Times, Nov. 11, 1997, at A16. In response, Strong stated: "I am glad to have your comments on the Jewish problem, and I shall appreciate your help along this line in the future. If we go beyond the 5 percent or 6 percent in the Class of 1938, I shall be grieved beyond words." *Id.*

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and the number of Jewish dentists to a mere seven. *Id.* at 427. Similarly, in 1887, Russia passed a law limiting the number of Jews in middle and higher schools to between two and fifteen percent. *Id.* at 426.

In his 1944-45 annual report as the Chairman of the Board of Admissions at Yale during the 1940s, Edward Noyes wrote, "the Jewish problem . . . continues to call for the utmost care and tact. . . .[T]he proportion of Jews among the candidates who are both scholastically qualified for admission and young enough to matriculate has somewhat increased and remains *too large for comfort*." *D.* Oren, *Joining the Club: A History of Jews and Yale*, p. 177 (Yale University Press 1985) (emphasis supplied) (citation omitted).

In the 1940s, "[e]veryone knew . . . that Columbia like most other colleges and universities did discriminate, especially against Jews . . .." W. Nelson, *The Changing Meaning of Equality in Twentieth-Century Constitutional Law*, 52 Wash. & Lee L. Rev. 3, 35 (1995). Nicholas Murray Butler, President of Columbia, "had earlier imposed quotas that had the effect of reducing Jews from forty to twenty percent of the student body." *Id.* (citation omitted).

The quotas used against Jews arose out of blatant anti-Semitism and were abhorrent. Jews were excluded from educational opportunities strictly because they were Jews, notwithstanding their qualifications. Although these types of quotas no longer appear to exist, it is important that they be kept firmly in mind in analyzing higher education admissions programs, lest we forget the lessons of our past.

B. Differences Between Quotas And Goals.

There are constitutionally significant differences between rigid, racial quotas and targeted goals. A quota is an inflexible template that is often based upon population percentages. Quotas mandate admissions based solely upon group membership and there are often sanctions imposed if they are not met. *See* M. Gottesman, *Twelve Topics to Consider Before Opting for Racial Quotas*, 79 Geo. L.J. 1737, 1748-49 (1991). By contrast, goals are flexible and are

based on the relevant, available, qualified applicant pool. They can be adjusted, as needed, and no sanctions are imposed if they are not met. While quotas used to limit the number of Jews in higher education were motivated by the discriminatory intent to restrict a particular group, goals have the intent of increasing the number of qualified minority members at the institution. *See* A. Goldman, *Justice and Reverse Discrimination,* p. 210 (Princeton University Press 1979) (quoting B. Sandler, 53 Commentary 14-16 (1972)).

The use of quotas in university admissions, like the ones discussed in Section I.A. above, is inappropriate and unlawful. Accepting or rejecting students for admission to public universities solely on the basis of their racial or ethnic background to achieve a predetermined numerical quota is harmful to both those students excluded and those admitted. Quotas simply have no place in American society.

In contrast to quotas, goals in the context of university admissions serve the compelling governmental interest of diversity and are supported by *amici.* (*See* discussion in Section II, *infra*.) These goals are not unlike aspirational business plans established by for-profit organizations. Sometimes the business plan targets are met, and sometimes they are not, but the shareholders are benefited because of the focus and the planning that is directed towards an important interest of the organization. For example, a company could set goals for profits that it hopes to achieve. Alternatively, a company could set goals as to the number of women and/or minorities that it would like to employ. Both these scenarios are indistinguishable from the University of Michigan's efforts to strive for a student body that reflects this nation's pluralistic character at its University and Law School.

C. The Admissions Programs Of The University Of Michigan And Its Law School Do Not Establish Quotas And Are Constitutional.

The admissions programs of the University of Michigan and its Law School are not quota systems. Unlike the admissions program in *Bakke* that was found unconstitutional where there were 16 of 100 seats set aside, there are no fixed numbers or percentages of persons from a given race who will be admitted. Rather, the race of an applicant merely is a factor that is considered during the admissions process. This is precisely what was envisioned by Justice Powell when he sanctioned the Harvard College admissions program in *Bakke*. 438 U.S. at 317 (Powell, J.) ("In such an admissions program, race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats."). (*See* discussion in Section III, *infra*.)

Every application is reviewed individually, in the context of the whole person. Each student's academic strengths, personal achievements and life experiences are given due consideration, among many other factors. The most overwhelming criteria used in making admissions decisions are academic qualifications (*e.g.*, grades, test scores and strength of curriculum). *See* JA 223-40. The University only accepts students who are academically qualified to do the work. *See* Pet. App. 111a.

These are not programs where students are admitted solely on the basis of their race. Such programs would be in violation of the Equal Protection Clause. The programs at issue here are different. Under the admissions programs of the University of Michigan and its Law School, there are multiple factors that are considered in the admissions process, both academic and non-academic. Although some

special consideration is given to the race of the candidate, race is not a dispositive factor. *See Gratz,* 122 F. Supp. at 828 (in College of Literature, Science and Arts admissions "points" system, twenty points awarded to under-represented minority applicants and "six points awarded for geographic factors, four points awarded for alumni relationship, three points awarded for an outstanding essay, five points awarded for leadership and service skills, twenty points awarded for socioeconomic status, [and] twenty points awarded for athletes"); *Grutter,* 288 F.3d at 747 ("the Law School's admissions policy states that '[t]here are many possible bases for diversity admissions' and that in evaluating 'soft' variables, it considers a range of factors such as leadership, work experience, unique talents or interests and the enthusiasm of an applicant's letters of recommendation.").

Criticisms have been leveled against the Law School admissions program because of its inclusion of a "critical mass" component. While the Law School does not strive to admit a particular percentage of under-represented minority students, it does seek to enroll a meaningful number or "critical mass" of such students, which it has defined as "sufficient numbers to ensure under-represented minority students do not feel isolated or like spokespersons for their race, and do not feel uncomfortable discussing issues freely based on their personal experiences." *Grutter*, 288 F.3d at 737.

Amici believe that the "critical mass" component of the Law School's admissions program does not render the admissions program unconstitutional. In contrast to quota systems, the Law School program does not "have a portion of the class that is set aside for a critical mass of under-represented minority students." *Grutter*, 288 F.3d at 737 (citing testimony of Dean Jeffrey Lehman). Of course, care must be taken in the implementation of this component to assure that it does not become a slippery slope to an unacceptable quota system. But such care was taken by the

University of Michigan Law School. In fact, from 1987 to 1998, under-represented minority enrollment at the Law School fluctuated between 12.3% and 20.1%. *Id.* at 748.[4] Looking at the Law School's admissions program over time, it becomes clear that a quota is not in place.

II. CONSIDERATION OF RACE TO ACHIEVE DIVERSITY IN PUBLIC UNIVERSITY ADMISSIONS FURTHERS A COMPELLING GOVERNMENTAL INTEREST.

A. The Value of Racial and Ethnic Diversity in Higher Education.

The value of a rich educational experience simply cannot be overstated. "Education . . . means emancipation. It means light and liberty. It means the uplifting of the soul of man into the glorious light of truth, the light by which men can only be made free." *The Blessings of Liberty and Education: An Address Delivered in Manassas, Virginia, on 3 September 1894*, in 5 *The Frederick Douglass Papers* 623 (J. Blassingame & J. McKivigan eds. 1992). What was stated by this Court in 1954 remains true to this very day:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education

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[4] Judge Boggs' dissent in *Grutter*, in disapproving of the "critical mass" component of the Law School's admissions program, focused on the 1995 to 1998 time period to conclude that "the Law School really seeks to enroll a critical *number* of minority students," *i.e.*, 13.5% to 13.7%. 288 F.3d at 801. However, it is important to look at the Law School's admissions program over a period of time to obtain an accurate picture of how it works. As this Court recently instructed, a "snapshot" of an educational program may not be sufficient for purposes of constitutional analysis. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 122 S. Ct. 2460, 2471 (2002).

> both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Brown v. Board of Education, 347 U.S. 483, 493 (1954).

Education is a vital interest not only for those in public elementary, middle and high schools, but also for those in our states' colleges and universities. College education prepares our citizens for fulfilling lives and rewarding careers. In addition to its "redemptive potential to heighten the glories and exhilarations of life" for the individual, J. Freedman, *Liberal Education & The Public Interest*, p. 70 (University of Iowa Press 2003), education provides important benefits to our society. "Liberal education urges upon us a reflectiveness, a tentativeness, a humility, a hospitality to other points of view, a carefulness to be open to correction and new insight, that can mitigate [social] tendencies toward polarity, rigidity, and intolerance." *Id.* at 57.

It is widely recognized that diversity plays a crucial role in enhancing the quality of higher education. "Diversity improves education. The study of history, art, literature, sociology, psychology, politics, philosophy, law, medicine,

and many other subjects thrives on discussion, in and out of class. Without schoolmates of diverse experience and viewpoints, including African-Americans, students would miss an essential part of their education. For that reason, '[v]irtually all selective colleges and professional schools have continued to consider race in admitting students.'"[5] J. Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 572 (2002) (citation omitted); *see also* P. Gurin, *Reports submitted on behalf of the University of Michigan: The Compelling Need for Diversity in Higher Education*, 5 Mich. J. Race & L., 363, 364 (1999) ("A racially and ethnically diverse university student body has far-ranging and significant benefits for all students, non-minorities and minorities alike. Students learn better in a diverse educational environment, and they are better prepared to become active participants in our pluralistic, democratic society once they leave such a setting."); K. Raines, *The Diversity and Remedial Interests in University Admissions Programs*, 91 Ky. L.J. 255, 284 (2002) ("A diverse student body . . . allow[s] students to experience different cultures through firsthand interactions with other students."). Moreover, students who receive higher education in a diverse setting will be better suited to compete in the global economy due to an improved ability "to understand issues from different points of view" and "to collaborate harmoniously with co-workers from a wide range of cultural backgrounds." *Investing in People: Developing All of America's Talent on Campus and in the Workplace*, p. 32 (Business-Higher Education Forum 2002) <http://www.acenet.edu/bookstore

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5 As Ralph Waldo Emerson wrote, "You send your child to the schoolmaster, but 'tis the schoolboys who educate him." R. Emerson, "Culture," *The Conduct of Life* (1860, rev. 1876).

/pdf/investing_in_people.pdf> (last visited Feb. 12, 2003) (hereinafter, "*Investing in People*").[6]

In addition to the educational benefit to individual students, diversity in higher education serves important communal interests. *See United States v. Brown University*, 5 F.3d 658, 683 (3rd Cir. 1993) ("As the district court conceded, the nation profits in immeasurable ways 'when our many great institutions of higher education open their doors to those who for too long were denied the privilege of attending college.'"). *See also Chilling Admissions: The Affirmative Action Crisis and the Search for Alternatives, p. 13* (Gary Orfield & Edward Miller, eds., Harvard Education Publishing Group 1998) (hereinafter, "*Chilling Admissions*") ("Universities must foster the creation of knowledge and the training of leadership for the community and its professions. Because of these critical functions of universities, admissions processes reflect considerations important to the fulfillment of community as well as individual goals. This is precisely what the Supreme Court recognized in the *Bakke* case.").

Diversity's importance in the context of higher education is a function of our nation's pluralistic character. Not only has racial and ethnic diversity been "a

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6 Because of the recognized educational benefits of diversity, it is not surprising that the American public, including university graduates, believes it to be of legitimate concern to university admissions decisions. In a recent study, 88% of those surveyed believed that having students of different races, cultures and backgrounds in higher education is important. And more than three quarters of them agreed that the universities "should be allowed to take action to ensure diversity in their student bodies." *Investing in People*, p. 32. *See also* W. Bowen & D. Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions*, p. 255 (Princeton University Press 1998) (hereinafter, "*The Shape of the River*") ("Of the many thousands of former matriculants who responded to our survey, the vast majority believe that going to college with a diverse body of fellow students made a valuable contribution to their education and personal development.").

distinguishing characteristic of the United States since it became a nation," *Investing in People*, p. 29, but evidence shows that our society is becoming more diverse in population everyday. In 2000, African Americans, Native Americans, Asian Americans and Hispanics made up twenty-nine percent of the population of the United States. *See CensusScope: Census 2000* (Social Science Data Analysis Network 2000)<http://www.censusscope.org/us/chart_race.html> (last visited Feb. 12, 2003). According to one estimate, these groups will constitute forty-seven percent of the United States' population by the year 2050. J. Meacham, *The New Face of Race*, Newsweek, p. 40 (Sep. 18, 2000).

Against this background, it would indeed be ironic if, with all the factors that universities take into account to assure diversity or otherwise serve the university's pedagogical and institutional interests – including geography, sports capability, socioeconomic or legacy status – that the only factors that may not be taken into account are those associated with populations that have been historically underrepresented on our campuses. Moreover, taken to its logical conclusion, the principle of absolute color-blindness might arguably lead to the conclusion that, under traditional civil rights analysis, even the types of preferences noted above are unconstitutional because of their adverse, disparate impact on minority groups. The preference for legacies, for instance, unquestionably favors white applicants at most universities. But the Constitution should not be read to compel reliance on numbers-driven, grades-based admissions standards alone, neither in those cases nor in the cases now before the Court.[7]

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7 As Justice Blackmun noted in his concurring opinion in *Bakke*: "It is somewhat ironic to have us so deeply disturbed over a program where race is an element of consciousness, and yet to be aware of the fact, as we are, that institutions of higher learning, albeit more on the undergraduate than the graduate level, have given conceded preferences up to a point to

The University of Michigan Law School's goal of maintaining a diverse student body is particularly compelling because "the proving ground for legal learning and practice cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and exchange of views with which the law is concerned." *Sweatt v. Painter*, 339 U.S. 629, 634 (1950). The admission of a diverse student body into our nation's law schools ineluctably has led – and will continue to lead – to the invaluable diversity that exists in our state and federal courts. "[I]t is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Bakke*, 438 U.S. at 313 (opinion of Powell, J.) (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)); *see also* R. Barnes, *Politics and Passion: Theoretically a Dangerous Liaison*, 101 Yale L.J. 1631, 1652 (1992) (The "diversity movement" "urges that the previously excluded be brought into positions of power not simply to remedy discrimination, but also to provide those institutions the benefit of the participation of all segments of society.").

B. This Court Has Recognized the Compelling Nature of Racial and Ethnic Diversity in Higher Education.

Considering race as a factor in order to achieve diversity in public university admissions furthers a compelling governmental interest. As was found by Justice Powell in *Bakke*, "the attainment of a diverse student body

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those possessed of athletic skills, to the children of alumni, to the affluent who may bestow their largesse on the institutions, and to those having connections with celebrities, the famous, and the powerful." *Bakke*, 438 U.S. at 404 (Blackmun, J., concurring).

. . . clearly is a constitutionally permissible goal for an institution of higher education." 438 U.S. at 311-12.[8]

Significantly, decisions by this Court after *Bakke* have never disavowed Justice Powell's discussion of diversity in higher education as a compelling governmental interest. Indeed, members of this Court have reaffirmed *Bakke's* continuing validity in that regard. In her concurring opinion in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), Justice O'Connor stated: "[A]lthough its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." *Id.* at 286 (citation omitted). In *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), *overruled on other grounds by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), Justice Brennan, in an opinion joined by Justices White, Blackmun, Marshall and Stevens, quoted *Bakke* for the proposition that "a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated." *Metro Broadcasting*, 497 U.S. at 568 (quoting *Bakke*, 438 U.S. at 311-13 (Powell, J.)).

For the last quarter of a century, colleges and universities across the country, including the University of Michigan, have relied upon this Court's pronouncements

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[8] Petitioners in *Gratz v. Bollinger* argue in their Brief (at page 47) that "there is no workable way to employ Justice Powell's framework for the consideration of race and ethnicity in educational admissions," and that it results in "subjective interpretations" of what is permissible. What Petitioners ignore, however, is the fact that admissions decisions include elements that are inherently subjective, and often are based on subtle judgments. The critical component of Justice Powell's sound framework is that race may be considered as part of an analysis that includes these subjective elements.

post-*Bakke*. In doing so, they have established admissions programs that not only are aimed at, but in fact have achieved significant progress in diversifying their student bodies. To accept petitioners' arguments and end this noble endeavor would result in a major retrenchment by institutions of higher learning from their efforts to offer their students meaningful opportunities to interact with and learn from others of differing background and experience.

III. THE ADMISSIONS SYSTEMS AT THE UNIVERSITY OF MICHIGAN AND ITS LAW SCHOOL ARE NARROWLY TAILORED TO MEET THE COMPELLING GOVERNMENTAL INTEREST OF ACHIEVING DIVERSITY AND DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

Admissions systems at institutions of higher education that are narrowly tailored to achieve diversity of their student bodies, like those at the University of Michigan, pass constitutional muster. Five Justices in *Bakke* joined in the Court's holding that a public university could, where appropriate, constitutionally consider race under a "properly devised admissions program" involving "competitive consideration of race and ethnic origin." 438 U.S. at 320 (Powell, J.); *id.* at 379 (Brennan, White, Marshall, Blackmun, JJ.). Justice Powell cited with approval to the Harvard College admissions program, "which take[s] race into account in achieving the educational diversity valued by the First Amendment." *Id.* at 316. Justice Powell described the Harvard program as follows:

> In such an admissions program, race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be

examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. Indeed, the weight attributed to a particular quality may vary from year to year depending upon the "mix" both of the student body and the applicants for the incoming class.

This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed

> fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.

Id. at 317-18 (footnotes omitted). In concurring with Justice Powell that race could be considered as a factor in university admissions, Justices Brennan, White, Marshall and Blackmun found that a state educational institution should be permitted to adopt a race-conscious program, like the Harvard plan, even without a finding on its part of past discrimination. *See id.* at 369.

In the cases before the Court, the University of Michigan and its Law School have carefully crafted their admissions programs to comply with the Court's decision in *Bakke*. Indeed, they have many of the same attributes of the Harvard plan that is discussed with approval in *Bakke*. Most significantly, all candidates in the admissions programs at the University of Michigan and its Law School are considered as individuals and are on equal footing in competing against one another. These programs are different from the admissions program at issue in *Bakke*, where disadvantaged minority students were assessed through a special admissions program and did not compete against the other applicants.

Importantly, disallowing the consideration of race as one factor among many in university admissions would have the effect of eliminating meaningful diversity on American campuses. William Bowen, the former President of Princeton University, and Derek Bok, the former President of Harvard University, estimated that, if a race-neutral admissions policy had been utilized at a sample of five selective colleges and universities, the number of African American students matriculating in 1989 would have fallen from 7.1% to 2.1%. *The Shape of the River*, p. 34. Similar results have been found in connection with law school admissions. *See* C. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. Rev. 1215, 1223-24 (2002)

(enactment of Proposition 209 (barring preferential treatment on the basis of race) and "heavy reliance" on LSAT scores resulted in serious declines in minority enrollments at UCLA Law School: "Compared to the averages between 1990-1996, the class of 2000 (admitted in 1997) represented a 73 percent decline in African American enrollment, a 27 percent decline in Latina/o enrollment, and an 80 percent decrease in American Indian enrollment."); L. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions*, 72 N.Y.U. L. Rev. 1, 28 (1997) (without race-conscious admissions decisions, number of African American students accepted at accredited law schools annually would drop from 6.8% to 1.6%).

Much has been written about so-called "percentage plans" in place in Texas, California and Florida.[9] These plans are deficient because they largely deprive universities of the ability to assess applicants as individuals. In addition, these plans have "failed to significantly increase enrollment for all minority groups, particularly at the most prestigious state institutions." *USCCR Report*, Chap. 4. *See also* C. Horn & S. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences*, p. 58 (The Civil Rights Project, Harvard University, Feb. 2003)

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[9] Texas instituted an admissions "percentage plan" in 1998 that "guarantees high school graduates in the top 10 percent of their classes admission to a Texas public college or university of their choice." United States Commission on Civil Rights, *Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education*, Executive Summary (2002) <http://www.usccr.gov/pubs/percent2.htm> (last visited Feb. 12, 2003) (hereinafter, "*USCCR Report*"). Under a state-imposed "Master Plan," the University of California must admit the top 12.5 percent of high school graduates. *Id.* In 1999, Florida "instituted the Talented 20 Program (T20 Program), which guarantees admission to one of Florida's 11 public institutions for students graduating in the top 20 percent of their high school class and completing a prescribed 19-unit academic high school curriculum." *Id.*

<http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.pdf> (last visited Feb. 12, 2003) ("the percent plans seem to have the least impact on the most competitive campuses, which have persisting losses in spite of many levels of efforts to make up for affirmative action"). Moreover, the viability of these plans depends upon the continued segregation of the nation's public schools, which *amici* find repugnant.

It is important to note that diversity cannot be achieved strictly by considering the socioeconomic status of applicants. "Most poor people in the United States are neither black nor Latino, and many of the minority students admitted to college through race-conscious affirmative action are not poor. A ranking of students below the poverty line by their test scores would result in a pool of favored applicants that was mostly Asian and white – many of them from temporarily poor families who managed to send their children to competitive schools that prepared them for college entrance exams." *Chilling Admissions*, p. 9.

Public universities, like the University of Michigan, are to be commended for reaching out to disparate groups in our society for inclusion in their student bodies. They are to be commended for carefully crafting admissions programs in order to comply with this Court's decision in *Bakke* and to achieve the diversity that they have found to be essential to higher education. "Indeed, except for the military and professional athletics, universities have done more than any other institution to bring minorities into full membership in American life .... These efforts have served to unite our shared destinies and burnish the legitimacy of democratic ideals." J. Freedman, *Liberal Education & The Public Interest*, p. 50 (University of Iowa Press 2003). *Amici* urge that the State of Michigan be permitted to choose which admissions programs to employ, so long as the programs used – like the ones at issue in the cases before the Court –

are narrowly tailored to achieve the compelling interest of achieving diversity.

* * *

The Rev. Martin Luther King, Jr., who was presented with the prestigious American Liberties Medallion in recognition of his "exceptional advancement of the principles of human liberty" at the American Jewish Committee's 58th Annual Meeting in 1965, closed his acceptance speech as follows: "So I close by quoting the words of an old Negro preacher who did not quite have his grammar right but who uttered the words of great symbolic profundity, in the form of a prayer: 'Lord, we ain't what we want to be; we ain't what we ought to be; we ain't what we gonna be, but, thank God, we ain't what we was.'" Martin Luther King, Jr., *Response to Award of American Liberties Medallion at the American Jewish Committee 58th Annual Meeting* (May 20, 1965) <http://www.ajc.org/InTheMedia/Publications.asp?did=403&pid=930> (last visited Feb. 12, 2003). This country should strive for the day when we are what we ought to be – diverse and equal. Until that time, race really does matter, and public universities should be permitted to consider race as one of a number of factors taken into account in their admissions programs in order to achieve the compelling state interest of diversity in higher education.

CONCLUSION

The decision of the Sixth Circuit in *Grutter v. Bollinger* should be affirmed and the judgment of the U.S. District Court for the Eastern District of Michigan in *Gratz v. Bollinger* holding that the undergraduate admissions program is constitutional should be affirmed.

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